

in the world, and our courts' ability to reach unpopular but just decisions is made possible only because of the deep wells of legitimacy they have dug.

I urge my colleagues to take the longer view for the good of the American people. Think carefully about what the result to our judiciary will be if we continue to pack our courts with extremists who ignore justice and the law. I implore my colleagues to take seriously their constitutional charge of advice and consent and to reject the nomination of Janice Rogers Brown.

Mr. JOHNSON. Mr. President, I rise today in opposition to President Bush's nomination of Janice Rogers Brown to be United States Circuit Court Judge to the Court of Appeals for the DC. Circuit.

This morning, the Washington Post editorialized against the nomination of Justice Brown, writing that she "is that rare nominee for whom one can draw a direct line between intellectual advocacy of aggressive judicial behavior and actual conduct as a judge." I agree with this respected newspaper's assessment and ask unanimous consent that this editorial be printed in the RECORD at the end of my statement.

The PRESIDING OFFICER. Without objection, it is so ordered.

(See exhibit 1.)

Mr. JOHNSON. I have several concerns about Justice Brown's ability to serve on this important court. On the California Supreme Court, Justice Brown has proven to be an activist judge when it suits her political agenda. Consistently, and despite precedent to the contrary, Justice Brown has ruled on the side of corporations. For example, in a cigarette sales case, she ignored relevant law and protected corporations in lieu of protecting minors. In other cases she has placed corporate interests above law that intended to shield consumers and women.

Justice Brown has also attempted to remove protections for teachers, and has been hostile to such New Deal era programs as Social Security. She has called government assistance programs "[t]he drug of choice for . . . Midwestern farmers, and militant senior citizens." These views are out of touch with most Americans and South Dakotans.

During today's debate, colleagues argued that because Justice Brown has been reelected by California voters by a 76 percent margin, she should not be considered "out of the mainstream." This argument is misplaced. First, many other judges get reelected at a higher rate. It should also be noted that her retention reelection took place only 1½ years into her tenure on the California Supreme Court, at a time before her extreme views and activist agenda could have been known by voters.

Both the American Bar Association and the California Judicial Commission have questioned Justice Brown's qualifications to serve on the bench. The California Judicial Commission

specifically noted questions about her deviation from precedent and her "tendency to interject her political and philosophical views into her opinions." We should note their concerns and seriously consider them.

Justice Brown's views and history of judicial activism is especially dangerous in the DC Circuit. She is a nominee who is far outside of the mainstream. For these reasons, I stand in opposition of the confirmation and life-long appointment of Janice Rogers Brown.

REJECT JUSTICE BROWN

[From the Washington Post, June 7, 2005]

The Senate filibuster agreement guaranteeing up-or-down votes for most judicial nominees creates a test for conservatives who rail against judicial activism. For decades, conservative politicians have objected to the use of the courts to bring about liberal policy results, arguing that judges should take a restrained view of their role. Now, with Republicans in control of the presidency and the Senate, President Bush has nominated a judge to the U.S. Court of Appeals for the D.C. Circuit who has been more open about her enthusiasm for judicial adventurism than any nominee of either party in a long time. But Janice Rogers Brown's activism comes from the right, not the left; the rights she would write into the Constitution are economic, not social. Suddenly, all but a few conservatives seem to have lost their qualms about judicial activism. Justice Brown, who serves on the California Supreme Court, will get her vote as early as tomorrow. No senator who votes for her will have standing any longer to complain about legislating from the bench.

Justice Brown, in speeches, has openly embraced the "Lochner" era of Supreme Court jurisprudence. During this period a century ago, the court struck down worker protection laws that, the justices held, violated a right to free contract they found in the Constitution's due process protections. There exist few areas of greater agreement in the study of constitutional law than the dispute of the "Lochner" era, whose very name—taken from the 1905 case of *Lochner v. New York*—has become a code word for judicial overreaching. Justice Brown, however, has dismissed the famed dissent in *Lochner* by Justice Oliver Wendell Holmes, saying it "annoyed her" and was "simply wrong." And she has celebrated the possibility of a revival of "what might be called *Lochnerism-lite*" using a different provision of the Constitution—the prohibition against governmental "takings" of private property without just compensation.

In the context of her nomination, Justice Brown has trivialized such statements as merely attempts to be provocative. But she has not just given provocative speeches; "*Lochnerism-lite*" is a fairly good shorthand for her work on the bench, where she has sought to use the takings doctrine aggressively. She began one dissent, in a case challenging regulation of a hotel, by noting that "private property, already an endangered species in California, is now entirely extinct in San Francisco." Her colleagues on the California Supreme Court certainly got what she was up to. In response, they quoted Justice Holmes's *Lochner* dissent and noted that "nothing in the law of takings would justify an appointed judiciary in imposing [any] personal theory of political economy on the people of a democratic state."

Justice Brown is that rare nominee for whom one can draw a direct line between intellectual advocacy of aggressive judicial be-

havior and actual conduct as a judge. Time was when conservatives were wary of judges who openly yearned for courts, as Justice Brown puts it, "audacious enough to invoke higher law"—instead of, say, the laws the people's elected representatives see fit to pass. That Justice Brown will now get a vote means that each senator must take a stand on whether some forms of judicial activism are more acceptable than others.

Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER (Mr. ALEXANDER). The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. FRIST. Mr. President, I ask unanimous consent the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

MORNING BUSINESS

Mr. FRIST. I ask unanimous consent that there now be a period of morning business with Senators permitted to speak for up to 10 minutes each.

The PRESIDING OFFICER. Without objection, it is so ordered.

PENSION SECURITY

Mr. REID. Mr. President, throughout this Congress, I have argued that the Senate ought to spend less time debating radical judges and more time focusing on issues that can improve the lives of working Americans. One such issue is the gradual erosion of retirement security. Instead of working to replace Social Security's guaranteed benefit with a risky privatization scheme, we should work to strengthen retirement by shoring up our pension system. In no industry is this looming pension crisis more acute than the airline industry. The Finance Committee held a hearing on pension problems facing the airline industry this morning, and I hope that the committee will move soon on legislation to fix those problems.

Last month we learned just how worrisome this issue is, as the Pension Benefit Guaranty Corporation and United Airlines agreed to terminate the four pension plans maintained by the airline as that company struggles to emerge from bankruptcy. At the same time, Northwest, Delta and American Airlines face similar pension liabilities and are requesting Congress' help so that they can avoid bankruptcy. To their credit they are fighting to preserve their workers' pensions but need some time to allow them to recover from the effects of the post-9/11 travel downturn.

While the pension funding problems facing the airline industry are substantial, the industry is not alone in inadequately funding their employee pension plans. Congress needs to carefully review the rules that apply to the broad spectrum of employers that offer pension plans to their employees. Congress needs to make sure that those rules are strengthened to require greater funding for the pension promises